U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 April 2005

BALCA Case No.: 2004-INA-36
ETA Case No.: P2003-NY-02492584

In the Matter of

WILLIAM B. SIMMONS,
Employer

on behalf of

LAILANI NIETO YSON,
Alien.

Appearance: Benjamin F. Cardinez, Esquire
New York, New York
For the Employer

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Lailani Nieto Yson ("Alien") filed by William B. Simmons ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, New York, New York, denied the application, and the Employer requested review pursuant to

20 C.F.R. §656.26. The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On April 30, 2001, the Employer, William B. Simmons, filed an application for labor certification to enable the Alien, Lailani Nieto Yson, to fill the position of "Domestic Cook (Live-in),"which was classified by the Job Service as "Cook (Household) Live-In" (AF 8). The job duties for the position, as stated on the application, are as follows:

> Plan menus; order and buy foodstuffs and ingredients; bake and cook meals for Employer and household guests; clean and maintain kitchen, cooking appliances and utensils.

(AF 8). The primary stated requirement is two years of experience in the job offered. In addition, Employer required "no smoking in premises." (AF 8).

In a Notice of Findings ("NOF") issued on May 15, 2003, the CO proposed to deny certification on the grounds, *inter alia,* that the Employer had rejected four qualified U.S. applicants for other than lawful job-related reasons, and failed to show that the job opportunity is clearly open to qualified U.S. workers. *See* 20 C.F.R. §656.21(b)(6) and §656.20(c)(8). (AF 39-41). The Employer submitted its rebuttal on June 18, 2003. (AF 46-58). The CO found the rebuttal unpersuasive and issued a Final Determination, dated August 7, 2003, denying certification on the above-stated grounds. (AF 59-60). On or about September 2, 2003, the Employer appealed the Final Determination. (AF 67-68). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals. Following the issuance of a Notice of Docketing and Order Requiring Statement of Position or Legal Brief, dated February 1, 2004, the Employer submitted a "Statement of Position," in which he adopted the contents of his Request for Review.

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. §656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and stop short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988); *Tilden Car Care Center*, 1995-INA-88 (Jan. 27, 1997). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

In reports of recruitment results, dated February 11, 2003 (AF 32) and February 25, 2003 (AF 37), respectively, the Employer provided various reasons for not hiring any of the seven U.S. workers who had applied for the job opportunity. For the purpose of this decision, our focus is on the four U.S. applicants cited by the CO in the NOF and Final Determination (*i.e.,* Paul Rodriguez, Barbara Gold, Scott Demeterio, and Yvette James). In summary, the Employer stated that he rejected these four U.S. applicants for the following reasons:

1. Paul Rodriguez: "He worked as a live-in house manager and cook. Does not meet specific experience requirement as solely domestic live-in cook." (AF 32).

2. Barbara Gold: "She has never worked as a full time live-in cook. (AF 32).

3. Scott Demeterio: "He worked as a live-in cook. He cooked, cleaned kitchen, shopped and served food. He also ran errands, moved furniture, did some plumbing repairs and other handyman chores around the house. Does not meet specific requirements for solely domestic live-in cook." (AF 37).

4. Yvette James: "No live-in cook experience requirement. She does not meet experience requirement." (AF 37).

In the NOF (AF 41-45), the CO found that the Employer had unlawfully rejected the above-named U.S. applicants. The CO stated, in pertinent part:

> The core duties of the position offered are cooking, therefore an applicant with the required experience as a cook is considered fully qualified despite the fact that the applicants (sic) experience was not gained in a domestic setting.
>
> Applicant Paul Rodriguez has over 25 years experience as a cook in both restaurants and private households, Barbara Gold has over 4 years experience as a chef, Scott Demeterio has 4 years as a chef for both a restaurant and private family, Yvette James has over 5 years experience as a chef, and these applicants meet the employer's minimum requirement of 2 years experience as a cook….
>
> If it is the employer's contention that he/she attempted to contact each of the applicants by telephone or by mail, employer must submit proof of such contact…
>
> In addition, employer must rebut these findings by further documenting lawful job related reasons for the rejection of these U.S. workers. Employer must document that each of the U.S. workers were not able, willing, qualified or available to accept this employment at the time of recruitment.
>
> If the applicant was rejected based on a interview, document further your lawful job-related reasons for rejection.
>
> If the applicant was rejected based on his/her resume, specify why he/she was rejected solely upon consideration of resume without benefit of an interview.

> If employer failed to do either of the above, further explain why he failed to interview or review resume but do not attempt to contact U.S. worker at this time since such contact will fail to cure this deficiency.

(AF 42).

The Employer's rebuttal, in pertinent part, consisted of a letter by Employer's counsel, dated June 17, 2003. (AF 56-58). In summary, Employer's counsel stated that the "domestic" requirement is a qualifying factor and part of the selection process. Since the position involves household employment, "the incumbent is expected and required to have the necessary experience in intra-familial situations, which just could not be obtained in a commercial environment." (AF 57). Employer's counsel stated: "While a person who has worked as a cook in a commercial establishment such as a restaurant may have the skills necessary to perform cooking work in a household, he/she may not have the skills, temperament and attitude to deal with the members of the household and their special needs." (AF 56). Accordingly, Employer's counsel argues that experience in a domestic setting is a bona fide requirement for the advertised position. In summary, Employer's counsel stated:

> The ultimate objective of any recruitment process is the selection and hiring of the "best" qualified applicant in the context of the specified requirements for the job, and the type and nature of the employment.
>
> While it is true than an applicant who meets the DOT standard for education, training, and/or experience as a cook, but whose work was gained in a commercial rather than a domestic setting, may be considered "qualified" for this job opportunity, such an applicant could not be considered the best qualified if there is one who also satisfies the "domestic" experience requirement solely as a cook.
>
> The particular individual applicants cited in your Notice of Findings were all rejected for failing to meet the test as clearly stated in the ETA 750A and the newspaper advertisement, i.e., two years experience as a live-in domestic cook.

(AF 56).

In the Final Determination, the CO found the Employer's rebuttal to be unpersuasive. The CO stated that the four U.S. applicants cited in the NOF were all qualified; that it is unclear how the Employer could determine if the U.S. workers had the skills, temperament and attitude to deal with household members; and, Employer failed to document lawful, job-related reasons for rejecting these qualified U.S. workers (AF 59). We agree.

The Board has consistently held that where a U.S. applicant's resume indicates a reasonable possibility that he/she meets the stated job requirement, an employer is obligated to further investigate such applicant's credentials (by interview or otherwise). Accordingly, in such case, an Employer may not summarily reject a seemingly qualified U.S. applicant based on the resume alone. *Gorchev v. Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990)(en banc); *Hambrecht Terrel International*, 1990-INA-358 (Dec. 11, 1991); *Dearborn Public Schools*, 1991-INA-222 (Dec. 7, 1993)(en banc); *Pico Investment Company*, 1994-INA-249 (Oct. 4, 1995); *A.A. Curbing, Inc.*, 1995-INA-427 (July 16, 1997).

In the present case, the resumes of the four U.S. applicants cited in the NOF show they each have more than the two years of cooking experience. (AF 31, 29, 36, 35). Notwithstanding their qualifications, it is unclear from the record whether the Employer interviewed all these applicants. Moreover, we note that Paul Rodriguez worked as a cook for more than two years in domestic settings, including employment as a live-in (AF 31) and Scott Demeterio also worked as a cook in a private home for more than two years. (AF 36). Therefore, even if we accept Employer's argument that two years cooking experience in a domestic setting is required, the Employer has failed to document a lawful, job-related reason for rejecting Messrs. Rodriguez and Demeterio.

Finally, we reject Employer's argument that, even if the U.S. applicants are

considered "qualified," he has a right to hire the "best" qualified applicant. (AF 56, 67). Although an employer understandably may want to employ a better qualified alien, it is well settled that U.S. immigration law requires that jobs go to qualified U.S. applicants. Accordingly, an employer cannot reject U.S. applicants because they are not the best qualified, or as qualified as the alien. *See, e.g., Exxon Chemical Company*, 1987-INA-615 (July 18, 1988)(en banc); *Veterans Administration Medical Center*, 1988-INA-70 (Dec. 21, 1988)(en banc); *Paperlera Del Plata, Inc.*, 1990-INA-53 (Jan. 31, 1992)(en banc).

In view of the foregoing, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the Direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.